In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 947

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MODERN TRASHMOVAL, INC., RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

This reply memorandum is addressed solely to respondent's assertion that this Court lacks jurisdiction to review these three cases because (1) the Secretary of Labor did not appeal the district court's denial of injunctive relief and (2) the Secretary is without authority to bring the wage suits because the issues of law have not been "finally settled" by the courts within the meaning of the proviso to § 16(c) of the Act, as amended, 29 U.S.C. 216(c) (Br. in Opp. 2).

1. Although the district court, in the exercise of its discretion, denied the government injunctive relief, it nonetheless made an adjudication, in that suit as in the

companion wage cases, that respondent's employees were subject to the provisions of the Act (Pet. 4a). Respondent appealed that ruling, seeking and obtaining a reversal of the decision in the injunction suit to the extent that it held respondent's employees to be covered by the Act (Resp. Br. in court of appeals, pp. 2, 86). Respondent now maintains that the Secretary, having filed no cross-appeal from the denial of the injunction, is barred from seeking a writ of certiorari in the injunction action to have the district court's decision reinstated. That contention, however, ignores the plain language of 28 U.S.C. 1254(1), which authorizes "any party" to a case in the court of appeals to apply for a writ of certiorari.[1] The Secretary was clearly "a party" to respondent's appeal. See *United States* v. *Gulf Refining Co.*, 268 U.S. 542, 544–545, where this Court held that it had jurisdiction to review a petition for certiorari by the United States in a criminal case where only the defendant had appealed and the court of appeals reversed and remanded for a new trial.

2. Respondent also contends that this Court lacks jurisdiction over the two back wage suits because the issues of law have "not been finally settled by the courts" within the meaning of § 16(c) (Br. in Opp.

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[1] The pertinent provision of 28 U.S.C. 1254 reads as follows:

"§ 1254. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

2). Both the court of appeals and the district court rejected that contention.

It is plain that *Mitchell* v. *Dooley Bros.*, 286 F. 2d 40 (C.A. 1), certiorari denied, 366 U.S. 911, settled the law with sufficient finality to authorize the bringing of these suits for the recovery of back wages. The trial court noted with approval that "The Secretary, quite understandably, heavily relies upon *Mitchell* v. *Dooley Bros., Inc.* * * * as a Court of Appeals decision establishing the right to sue on behalf of defendant's employees" (J.A. 20). And while the court of appeals did not regard *Dooley Bros.* as dispositive (Pet. 24a), it nonetheless held that "the legal principles here have been established within the meaning of the prohibition against test suits in 29 U.S.C.A. § 216(c) * * *. Actions commenced by the Secretary to enforce the provisions of the Act cannot be barred on the sole ground that application of the law to the facts is difficult and onerous." (Pet. 35a–36a.) If the law is now unsettled, it is unsettled only by virtue of the decision of the court of appeals below.

Moreover, it is plain from the legislative history of § 16(c) that this is not the type of action which Congress intended to forbid. The proviso to that section was inserted by the conference managers on the 1949 Amendments, who explained that its purpose was to prevent the Secretary from using his authority under § 16(c) "to bring test cases involving new or novel questions of law" and that it was "not intended, however, to preclude [him] from instituting suits or the court from taking jurisdiction on the basis of existing legal precedents * * *." See

Statement of the Managers on the Part of the House, 95 Cong. Rec. 14934. Similar language appears in the Report of the Majority of Senate Conferees. 95 Cong. Rec. 14874, 14879. Cf. *Mitchell* v. *Independent Ice & Cold Storage Co.*, 294 F. 2d 186, 189 (C.A. 5) certiorari denied, 368 U.S. 952. Plainly, these cases were not instituted as a "test case," but were brought as enforcement actions to collect unpaid back wages.

Respectfully submitted.

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APRIL 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964